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CAPITAL PUNISHMENT AMONG THE JEWS

A PAPER READ BEFORE THE

NEW YORK BOARD OF JEWISH MINISTERS

BY

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NEW YORK

BLOCH PUBLISHING COMPANY

1916

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CAPITAL PUNISHMENT

In the following essay, an attempt is made at tracing the history of capital punishment among the Jews. From the Biblical period onwards, there took place a long and complex development of the principles, the methods and the application of capital punishment.

The story of this development is contained chiefly in the Old and the New Testaments, Josephus, the Rabbinic writings and the Responsa of the Middle Ages. The following study, which is based on these sources, attempts to make clear what was the nature of this development.

The Four Methods of Capital Punishment

According to a saying of the Rabbis, nine hundred and three different methods of death have been created for man.[1] But Rabbinic jurisprudence recognised only four legal methods of inflicting death as the penalty for a capital crime, namely: stoning, burning, decapitation and strangulation.[2] One man, Yakim (or

[1]Ber. 8a, with reference to Ps. lxviii, 61.
[2]Mishna Sanh. vii, 1.

Yakom), a nephew of Jose ben Joezer (2nd cent. B. C. E.), is said to have killed himself by all four methods at once. He first set up a beam from which he hung a noose. Then he arranged faggots at the foot of the gibbet, surrounded them with stones and set a sword with its blade pointing upwards in the stones. He then kindled the faggots and hanged himself in the noose, the flames burned away the rope so that his body fell into the fire, and at the same time on to the stones and on the sword-blade.[3]

(a) *Stoning*

In appraising the Jewish attitude towards capital punishment in general, it is necessary first to examine the history of these four methods of capital punishment among the Jews.[4] The first to engage our attention is STONING (*Sekilah*).

In Biblical and Rabbinic legislation, stoning is the punishment decreed for a number of transgressions, such as idolatry, Moloch worship, magic, necromancy, false prophesying, Sabbath desecration, blasphemy of God's Name, cursing of parent, and other crimes, seventeen in all, listed in the Mishna.[5]

Stoning was apparently the usual method of inflicting the death penalty in Biblical times whenever burning was not specifically called for.[6] It was

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[3]Gen. Rab. lxv, 22.

[4]This subject has been dealt with at length by A. Buechler, *Monatsschrift f. Geschichte u. Wissenschaft des Judentums*, 1906, Vol. L.

[5]Sanh. vii, 4.

[6]Compare Lev. xx, 10 with Deut. xxii, 24; and Num. xv, 35 with Exod. xxxi, 14f, and xxxv, 2; Matt. xxv, 37; Luke xiii, 34.

carried out outside the camp or town or at the gate,[7] by the people or mob, without any other ceremony[8] than the casting of the first stone by the witnesses.[9]

In post-Biblical times, we find that according to John x, 31, "the Jews took up stones again to stone" Jesus. According to Acts vii, 57f, Stephen, the protomartyr of the Church, was stoned, but whether by the uprising of the mob or by judgment of the court, is not clear.[10] According to Luke xx, 6, the chief priests and the scribes and elders feared to suggest that John the Baptist was not a prophet, because if they did so "all the people will stone us." In a passage which is admittedly a Christian interpolation in Josephus, we are told that the Sadducean high priest Anan (62 C. E.) removed James, the brother of Jesus, and some others by stoning, after a semblance of a legal trial.[11]

In the Rabbinic literature also, there are incidental references to actual cases of stoning, which may seem to imply that in the earliest Rabbinic period lapidation was carried out in the simple manner described in the Bible. In the Mishna,[12] it is stated that a priest who ministered in the Temple in a state of ritual impurity was beaten on the skull by the young priests, with

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[7]Lev. xxiv, 14, 23; Num. xv, 35f; Deut. xvii, 5; xxi, 19ff; xxii, 24; Acts vii, 58.

[8]Lev. xxiv, 16; Num. xiv, 10; Deut. xxi, 21; xxii, 21; I Sam. xxx, 6; I Kings xii, 18; xxi, 10, 13; II Chron. x, 18; xxiv, 21; Exod. xvii, 4; viii, 22; Josephus, *War* I. xxvii, 6; *Antiq.* XVI, xi, 17; XVI. x, 5.

[9]Deut. xvii, 7.

[10]Overbeck, *Apostelgeschichte,* 114; J. Juster, *Les Juifs dans l'Empire Romain,* II, 138, note 2; Schuerer, II, 262.

[11]*Antiq.,* XX, ix, 1; Schuerer (4th edit.), I, 581.

[12]Sanh. ix, 6.

blocks of wood.[13] In early Rabbinic times, the death penalty by stoning was undoubtedly carried out. Rabbi Eleazar ben Jacob (1st cent. C. E.) states that as an exemplary measure, the Jewish court (*Beth Din*) in Grecian days, imposed the sentence of stoning on one who rode on horseback on the Sabbath.[14] Tosefta Sanhedrin ix, 5, mentions a definite case of a man going out to be stoned. Tradition states further that Ben Satda, later wrongly identified with Jesus[15], was stoned.[16] The Beth Din in Jerusalem is also said to have inflicted the death penalty by stoning for a case of apparent incest and for another gross crime.[17] But whether any of these cases of stoning was carried out in the Pharisaic method of precipitation described in the Mishna Sanhedrin vi, 4, is not clear from the sources.[18]

It may be asked what basis there was for the Pharisaic modification of lapidation to precipitation. In a war with Edom, captive Edomites were killed by being precipitated from a rock.[19] Two Jewish mothers who had circumcised their children during the persecutions of Antiochus Epiphanes are said to have been killed by being hurled from the wall of the city.[20] The

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[13]Compare Tosefta Kelim i, 6; Josephus, *War,* I, xxvii, 6.
[14]J. Chag. II, 14, 78a; Sanh. 46a.
[15]Tos. Sabb. 104b; Chajes in *Hagoren,* IV, 33-37; Zuckermandel, *Gesam. Aufsaetze,* II, 193.
[16]Sanh. 67a; Tos. Sanh. x, 11; J. Sanh. VII. 2, 25d top.
[17]Kid. 80a; Git. 57a.
[18]Buechler *loc. cit.,* p. 691, doubts whether the method of precipitation was ever legally used.
[19]II Chr. xxv, 12.
[20]II Macc. vi, 10; but Josephus, *Antiq.,* XII. v, 4 says that they were crucified and then strangled by having their children hung round their neck.

false witnesses who accused Susanna were similarly dealt with.[21] The gospel according to Luke relates that the people of Nazareth wished to cast Jesus headlong from the brow of the hill whereon their city was built.[22] Precipitation was therefore a well recognised modification of lapidation, and not a sheer invention of the Rabbis.

A similar modification was very early introduced in the treatment accorded to the scapegoat. Instead of the scapegoat being sent forth into the wilderness, as the Bible describes,[23] it was in practise precipitated from a rock. Similarly, the Pharisaic tradition early substituted precipitation for stoning in the case of human punishment. According to a convincing emendation of a Talmudic text suggested by L. Ginzberg,[24] precipitation had taken the place of lapidation at least as early as the time of R. Jochanan ben Zaccai, (fl. 75 C. E.).

The Rabbis held lapidation to be the most severe of the four death penalties, and precipitation was regarded as a humane modification of it. The Mishna states that the victim was thrown from twice a man's height, i. e., about 11 feet. But if you wish to ensure a certain and easy death, asks the Talmud, why not cast him from a greater height? The answer is given because that would lacerate the body.[25] The words "his blood

[21] Susanna 62, LXX text.
[22] Luke iv, 29.
[23] Lev. xvi, 22.
[24] Students' Annual, 1914, pp. 146, 147. I gladly take this opportunity of acknowledging my indebtedness to Prof. Ginzberg who read this essay in manuscript and gave me valuable suggestion on many points.
[25] Sanh. 45a bottom.

shall be on him"[26] were taken as implying that he shall be so killed that the blood shall remain *in* him. The change in method advocated by the Pharisees therefore seems to have had for its purpose the desire to make the death more humane, certain and speedy, and to preserve the body so far as possible from being mangled. The custom of giving to the one condemned a wine compounded with myrrh to dull the senses,[27] would be another expression of this desire to rob the punishment of its horror and pain.

(b) *Burning*

The second death penalty, that of BURNING (*Serefah*), is prescribed by the Biblical law for a priest's daughter who commits adultery, and for the crime of incest with mother and daughter.[28] The house of the guilty may also have been burnt.[29] There is no reason to doubt that this punishment in Biblical times involved the actual burning of the living victim.[30]

In post-Biblical times, we find that on March 13, 4 B. C. E., Herod burnt alive Matthias and his companions who had pulled down the golden eagle set up over the gate of the Temple.[31] But this was the act of a despotic monarch and not of a court of law. Josephus reports about himself that the Galilean mob regarded

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[26]Lev. xx, 9, 11, 12, 13, 16, 27.

[27]Sanh. 43a; Mark xv, 23; Matt. xxvii, 34; Prov. xxxi, 6.

[28]Lev. xxi, 9; xx, 14; Cf. Gen. xxxviii, 24 (Tamar) and Josh. vii, 15, 25 (Achan).

[29]Jud. xii, 14, 15; Josh. vii, 15, 24; Josephus, *War,* II. xxi, 3, 7.

[30]Josephus, *Antiq.,* IV, viii, 23, to Levit. xxi, 9. Compare Dan. iii, 6.

[31]Josephus, *Antiq.,* XVII, vi, 4; *War,* I, xxxiii, 4.

him as a traitor, and some cried out to stone the traitor and others to burn him.[32] This also would have been the act of a passionate populace in wartime, and not a legally imposed punishment. But there is one well attested instance in early Rabbinic times of an actual burning by decree of a court of law. This was reported by Rabbi Eleazar ben Zadok (fl. c. 100 C. E.), who said that as a young child he had seen the adulterous daughter of a priest bound around with vine branches and burnt.[33] His fellow Rabbis, representing the Pharisaic tradition, declared that such a course of action involving a literal burning, could have been carried out only by an unlearned court (Mishna), or, according to R. Joseph, by a Sadducean court.[34] The Book of Jubilees, which is also Sadducean in its Halacha, prescribes burning for the marriage of a Jewess with a non-Jew, for adultery and incest.[35]

But the Pharisaic tradition, as is well known, mitigated the severity of the punishment by changing it into strangulation followed by a slight, almost symbolic burning of the throat and inward parts.[36] The reasons for the change of method are apparently the same as in the case of stoning, first, the desire to rob the death of its pain[37], and secondly, to avoid marring the body.

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[32]*War,* II, xxi, 3.

[33]Mishna Sanh. vii, 2; Tos. Sanh. ix, 11; J. Sanh. VII, 24b; B. Sanh. 52b.

[34]Sanh. 52b.

[35]Jubilees xxx, 7; xx, 4; xli, 25, 26. For the Pharisaic view of the application of this penalty, see Mishna Sanh. ix, 1.

[36]Mishna Sanh. vii, 2. R. Jehudah while upholding this method suggests a modification of the procedure.

[37]Tos. Sanh. ix, 11.

This latter reason is emphasized in the statement of Rab Mathna in the Talmud[38], that the modification in the method was approved so that the breath of life should be burnt out and the body preserved, as was supposed to have been the case with the sons of Korah.[39] Rabbi Eleazar adduces the same reason, referring to the case of the sons of Aaron.[40] The Tannaitic tradition held that Nadab and Abihu met their death through two narrow tongues of flame coming forth from the holy of holies, each dividing into two and entering into the nostrils of the two men, thus burning out the breath of life and leaving their clothes and their bodies uninjured.[41] Similarly, the Syriac Apocalypse of Baruch says that Sennacherib's army was burnt by God only within their bodies.[42] This statement reflects the Midrashic tradition that because Shem covered his father's nakedness, the clothing of his Jewish descendants Nadab and Abihu, and of his non-Jewish descendants composing Sennacherib's army, was not burnt when the fire of the Lord burnt out their lives.[43]

In all this is emphasized the Pharisaic desire to preserve the body of the victim uninjured. According to R. Joseph, who declared that a court which sentenced

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[38]Sanh. 52a.

[39]Num. xvi, 35.

[40]Lev. x, 2, 6. Sifra ed. Weiss ibid., 45c, 34; 46a, 41; Tosafoth Sanh. 52a.

[41]Sanh. 52a; Sifra 45c, 34. But contrast Josephus *Antiq.*, III, viii, 7, who says that their faces and breasts were burnt.

[42]Baruch lxiii, 8; Susanna 62, LXX text, says that fire from heaven burnt the false witnesses after they had been precipitated.

[43]Lekach Tob to Noach IX, 23; Tanhuma Noach 21, p. 25b.

to an actual burning must have been a Sadducean court,[44] this consideration was not of weight with the Sadducees. It has been suggested therefore, that this desire of the Pharisees may have been connected with their belief in the resurrection of the body, a belief rejected by the Sadducees.[45]

The method of burning advocated by the Pharisees does not seem to go back beyond the Christian era. The incident of the actual burning of the priest's daughter, witnessed by Rabbi Eleazar ben Zadok shortly before the fall of the Temple, might be interpreted as implying that the change in method was then taking place.[46] There is no mention in the sources of a case of burning being carried out in the Pharisaic manner, although the full details preserved in the Mishna, describing the application of the method, would imply that the method had been in use. But the number of cases of the possible application of the penalty was limited, and a burning must have been a rare occurrence.

(c) *Beheading*

The third legal capital punishment recognised by the Rabbis is BEHEADING (*Hereg*). Death by the sword, although recognized in a blood feud and often used by kings,[47] is nowhere mentioned in the Bible as

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[44]Sanh. 52b.

[45]N. Bruell, *Beth Talmud,* 7ff, quoted by Buechler *l. c.* 558, note 1.

[46]Notice also the contradiction between Josephus' account of the burning of Nadab and Abihu and the Pharisaic tradition referred to above, note 41.

[47]E. g. II Kings x, 7.

a penalty ordered by law, except for the apostasy of a whole community.[48] According to the Mishna,[49] murder also is punished by beheading. The Boethusians,[50] the Samaritans,[51] Philo,[52] Jesus,[53] Josephus,[54] the Book of Jubilees,[55] Eliezer ben Hyrcanus, (1st cent. C. E.),[56] like the later Karaites,[57] all agree in recognizing the Biblical talio as the punishment for murder. This does not necessarily imply that the *method* of inflicting the death penalty had to be the same as the method used by the murderer. It implies only that murder was punishable by death.

The Pharisaic ruling that the death penalty for murder was inflicted by decapitation is not disputed by any of the Rabbis.[58] But the method of the execution is debated. The Mishna states that the victim's head was cut off at the throat with a sword, as the (Roman) government carried out an execution.[59] R. Jehudah (135-220 C. E.) objected that this *jus gladii* would disfigure the victim.[60] He therefore advocated, that instead of the old method recognized by the Rabbinical tradition, the murderer's head should be

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[48]Deut. xiii, 13-16.
[49]Sanh. ix, 1; Mechilta to Exod. xxi, 12.
[50]Scholion to Megillath Taanith 4.
[51]Revel, *Jew. Quart. Rev.*, New Series, III, 364, note 86.
[52]Ritter, *Philo und die Halacha*, 18ff.
[53]Matt. v, 38; see also xxvi, 52.
[54]*Antiq.*, IV, viii, 35.
[55]Jubilees iv, 32.
[56]Baba Kamma 84a.
[57]Revel, *Jew. Quart. Rev.*, New Series, III, 364-366.
[58]Mechilta 83b to Ex. xxi, 20.
[59]Sanh. vii, 3.
[60]Similarly Baba Bathra 8b, Death by the sword is worse than a natural death because it disfigures.

placed on a block and chopped off at the neck with an ax. The Rabbis protested that this method of beheading advocated by R. Jehudah would be far more shameful to the victim than that common to the Jews and the Romans. R. Jehudah admitted the force of their objection, but defended the method advocated by him because it was not the same as Roman custom. The Talmud then proceeds to eliminate other possible methods of killing by the sword, such as piercing or cleaving the body, by quoting the principle of the golden rule "Thou shalt love thy neighbor as thyself."[61] Therefore we must choose for him the easiest death. The comparison is then brought with the heifer that was killed to atone for bloodshed.[62] As the heifer, the substitute for the unknown murderer, was killed by having its throat cut, so the known human murderer had his throat cut and not his head chopped off at the neck, the golden rule again being quoted as authority.[63]

In this case also the sources do not mention an actual case of decapitation being carried out by a Jewish court. According to the New Testament, Herod Antipas had John the Baptist killed by beheading,[64] and Agrippa I. caused James the apostle, the brother of John, to be killed by the sword.[65] But

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[61]Lev. xix, 18.

[62]Deut. xxi.

[63]Sanh. 52b; Mechilta 83b to Exod. xxi, 20; J. Sanh. VII, 24b. Also Genesis Rabba 44 beginning, and the legend of the *neck* of Moses becoming hard as marble before the sword of Pharaoh. J. Berachoth, ix, 1 (where the exact phrase used by the Mishna occurs); Exod. Rab. 1 to Exod. ii, 15.

[64]Matt. xiv, 10; Mark vi, 27; Luke ix, 9. Cf. the interpolation in Josephus, *Antiq.*, XVIII, v, 2.

[65]Acts xii, 2. Cf. Rev. xx, 4 of the Christian martyrs.

neither of these executions was ordered by a Jewish court of law.

(d) *Strangulation*

The fourth method of capital punishment recognised in Pharisaic tradition is STRANGULATION (*Henek*).

Strangulation does not appear in the Bible as a recognised legal method of punishment. The only Biblical instance of death by strangulation is the suicide of Ahitophel.[66]

The Mishna[67] specifies strangulation as the punishment for the son who purposely wounds his parent, for the false prophet, for the one who prophesies in the name of idolatry, for stealing a Jew, for adultery with a married woman, seducing a priest's betrothed or married daughter, etc. It was the method of capital punishment preferred by the Rabbis; for R. Yoshia said that wherever the Bible does not specify the method of carrying out the capital sentence, strangulation should be adopted because it is the least severe measure. Rabbi Jonathan also said that strangulation should be adopted, even though in his judgment strangling is not an easier method of death than other methods.[68] The reason for this preference seems to be because of the four legally recognized methods of capital punishment, strangulation as it was carried out was the only one which left the body practically uninjured. The condemned man was to be sunk up to

[66]II Sam. xvii, 23; Cf. I Kings xx, 31 "ropes upon our heads." Tobit ii, 3 (Strangulation).
[67]Sanh. xi, 1.
[68]Sanh. 52b bottom; Sifra 92a, 11.

his knees in mud and then strangled by having a hard cloth which was wrapped in a soft one twisted around his neck and pulled in opposite directions until the suffocated victim died.[69] Strangulation therefore satisfied the Rabbinic desire to avoid marring the body far better than did stoning, burning or decapitation. R. Jehudah explains that the death penalty as inflicted by man should be like that inflicted by God in not injuring the human body.[70] This consideration it was, also, as we have seen, that played a large part in inducing the Rabbis to mitigate the method of burning, by reducing it to strangulation followed by an almost symbolical burning.

Again, in this case, the sources do not mention any definite case in which the punishment of strangulation was actually carried out as a result of a court judgment. But it is clear that strangulation induced in the older manner of hanging was not infrequently consummated in the earlier Rabbinic period. Raguel's daughter Sarah "thought to have hanged herself."[71] A proverbial remark in the mouth of Rabbi Akiba (d. c. 132 C. E.), 'if you wish to strangle yourself, hang yourself on a high tree',[72] would indicate that hanging was a well recognised method of death. According to one source, Judas Iscariot hanged himself.[73] It is reported by Rabbi Eleazar,[74] that Simon ben Shetach (fl. 80 B. C. E.) hanged women in Ascalon. But in

[69]Mishna Sanh. vii, 3.
[70]Sanh. 52b; Sifra 92a, 11.
[71]Tobit iii, 10.
[72]Pes. 112a bottom; cf. Semachoth II, 3.
[73]Matt. xxvii, 5. But see the different story in Acts i, 18.
[74]Mishna Sanh. vi, 4.

this case the question arises whether they were hanged alive or hanged as a reproach after they had been otherwise killed.

Hanging, according to Biblical custom, was meted out to the *dead* body of one who had been otherwise killed. The order of the words in Deut. xxi, 22, 23 implies, that first the malefactor has been put to death, and then as an added indignity his corpse is suspended. The same treatment of hanging the corpse was meted out to the murderers of Ishbosheth.[75] Similarly, Joseph tells the chief baker that in three days Pharaoh will take off his head and then hang his dead body.[76] The dead bodies of Saul and Jonathan were hung up by the Philistines.[77] The five kings were first killed by Joshua and then hanged.[78] A momentary hanging of the corpse was recognised by the Rabbis in the case of the male idolator or blasphemer.[79] From these examples of Jewish custom and from the context in the Mishna and Talmuds, it becomes clear, that the witchcraft victims of Simon ben Shetach's zeal, were hanged in ignominy *after* the death penalty had been otherwise inflicted. In any case, the discussion in the Mishna and the Talmud[80] shows that the action of Simon ben Shetach was an exceptional action, from which no conclusion as to the regular course of law could be drawn. There is consequently no evidence of

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[75]II Sam. iv, 12.
[76]Gen. xl, 19.
[77]II Sam. xxi, 12.
[78]Josh. x, 26. But in Persia, the victim may have been hanged alive, as the book of Esther seems to imply.
[79]Mishna Sanh. vi, 4; Sanh. 46b; J. Chag. II, 78a.
[80]Sanh. 46b.

hanging alive ever having been carried out by a judicial sentence of the Rabbis. It need scarcely be added that the Roman punishment of crucifixion was a penalty unknown to Jewish law and abhorrent to Jewish feeling. The inhuman savageness shown by Alexander Jannaeus in crucifying his prisoners of war was no more a legally recognised form of capital punishment than was his cutting the throats of the wives and children before the eyes of the crucified victims.[81]

Jewish Attitude Towards Capital Punishment

Having summarized the history of the four methods of legal capital punishment recognised by the Jews, we are now in a position to review more broadly the question of the Jewish attitude towards capital punishment.

The Hebrew Bible undoubtedly stands for the principle of capital punishment, as has clearly emerged from the detailed consideration of the particular methods of inflicting the death penalty set forth above. In Biblical times, when the organization of Jewish society was comparatively simple, retributive justice brooked few of the law's delays. In the simplest and most rapid manner, the avenger of blood exacted the penalty of life for life. Society protected itself by a swiftly effective punishment.

But the Bible recognises in capital punishment also a deterrent character and an expiatory character, in addition to its retributive character. It holds capital punishment to be a necessity as a deterrent. The phrases

[81]Josephus, *War*, I, iv, 6.

"and thou shalt remove the evil from thy midst," "and Israel shall hear, and understand and no more do this evil," which occur many times, coupled with the admonition to impose capital punishment, show that this preventive purpose was closely associated with the imposition of the death penalty. Malicious false witnesses had to be treated as they would have treated the one against whom they had testified, so that the public should take warning.[82]

The Bible also teaches explicitly that capital punishment is the just punishment for murder, in order to atone for the pollution of the land.[83] No pity was to be shown to the wilful murderer.[84] The right of sanctuary granted to the one guilty of manslaughter, was not granted to the murderer,[85] and the crime of shedding innocent blood had to be atoned for in order to cleanse the sacred community of Israel.[86]

Yet the old Testament teaching of justice is tempered by mercy. "But if the wicked turn from all his sins...he shall surely live, he shall not die... Have I any pleasure in the death of the wicked? saith the Lord God; and not rather that he should turn from his way and live."[87] It was a duty to try to save those going to death.[88]

The New Testament also admits the right of society

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[82]Deut. xix, 16-21. Cf. also Deut. xiii, 12, xvii, 13, xxi, 21 of the rebellious son, where the deterrent nature of the punishment is again specifically mentioned.
[83]Num. xxxv, 33; Deut. xix, 13.
[84]Deut. xix, 11-13.
[85]Exod. xxi, 14; Num. xxxv, 11, 12.
[86]Exod. xxi, 13.
[87]Ezek. xviii, 21-23; xxxiii, 14-16, 19.
[88]Prov. xxiv, 11-13.

to exact capital punishment.[89] We have seen that Philo, Josephus[90] and the apocryphal and apocalyptic books also do not doubt the reasonableness and necessity of capital punishment. In the last pre-Christian century, the Jewish people, particularly the Sadducees who were in the ascendant, still followed the Bible in their maintenance of the theory and the practise of capital punishment. The letter and the spirit of the Biblical laws governed Jewish practise. But in the first post-Christian centuries, these teachings of the Bible were modified in many directions.

It may be safely affirmed that the Rabbis did not question the right of society to inflict capital punishment, even though they pictured God as grieving over the death of the wicked.[91] In the Mishna, they enumerated thirty-seven crimes (nineteen of morals, twelve of religious law, three against parents and three assaults), which they held to be punishable by death. In commenting on the Biblical warning "thine eye shall not spare the wilful murderer," they say 'thou shalt not say wherefore should I punish murder by murder. The one whom thou knowest indubitably to be guilty of a premeditated murder thou shalt not pity nor spare.'[92] The sternness of the capital sentence was recognised by the Rabbis as being in the best interests both of the criminal and of society.[93] "When the

[89]Matt. xv, 4; xxvi, 52; John xix, 10, 11; Acts xxv, 11; Romans xiii, 1-14.

[90]*Cont. Apion.*, II, 31, "the punishment for most sinners is death." *Antiq.*, IV, viii, 35.

[91]Mishna Sanh. vi, 5.

[92]Sifre to Deut. xix, 13. Cf. Deut. xiii, 9 of the seducer to idolatry.

[93]Mishna Sanh. viii, 5.

wicked perish there is joyful shouting," was quoted in justifying the death penalty, to convince those who hesitated to help bring a capital offender to justice.[94] R. Akiba declared that so long as sinners such as Achan remain alive, the Divine anger rests upon the community. But when they are put to death, the Divine favor is restored.[95] The noxious thorns in the garden of humanity must be destroyed.[96] When Akiba (d. c. 132 C. E.), claimed that had he been a member of the Sanhedrin, a death sentence for murder or immorality would never have been imposed, Rabbi Simon ben Gamliel retorted "had you been a member of the Sanhedrin, you would have been responsible for the increase of murders."[97]

The Rabbis also approved of the preventive character of the Biblical death penalty. For instance, the death penalty for the rebellious, gluttonous son, is regarded by them not as a punishment commensurate with the wrong that the son may have committed, but as a preventive measure, necessary for society and necessary for the criminal. In explaining why the son must pay the penalty of death even though he has not spilled blood nor committed any major offence, they say that the Torah looks ahead. Let him die before he has incurred graver guilt; otherwise he will sink lower and lower until finally he commits a capital offence. Therefore he should be put out of the way as a pre-

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[94]Prov. xi, 10; Mishna Sanh. iv, 5.

[95]Mishna Sanh. x, 6 end, with reference to Josh. vii, 1 and vii, 26.

[96]Genesis Rabba 44 to Gen. xv, 1.

[97]Mishna Macc. i, 10; Macc. 7a, Tosafoth.

ventive measure.[98] Although we immediately see the danger lurking in such a principle of preventive punishment, the recognition of this principle by the Rabbis, is further evidence that in theory they approved of the death penalty.

Furthermore, the Rabbis approved of a fitting retribution. Biblical justice demands that the punishment correspond with the crime. He who digs a pit should fall into it.[99] The Psalmist prays that God may repay the wicked according to the works of their hands.[100] The Rabbis recognise this principle of retribution in kind in every phase of life.[101] The principle underlying the talio is that which they call "measure for measure."[102] Bloodshed, according to this principle, could be expiated only by bloodshed.[103]

The Rabbis also saw in the death penalty an expiation of the sin that had been committed. This supreme expiation was religious in character, and was brought into connection with the Temple and its sacrificial worship. Thus it is stated that only so long as the altar stood,[104] or the priest officiated,[105] could the

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[98]Mishna Sanh. viii, 5; Sanh. 72a; Sifre to Deut. xxi, 18-21. It must be remembered that this case is purely theoretic. See text to notes 214 and 215.

[99]Ps. vii, 16f; Eccl. x, 8f; Prov. xxvi, 27; Ben Sira xxvii, 26.

[100]Ps. xxviii, 4; Isa. iii, 10, 11; Job xxxiv, 11; Obad. 15; Lev. xxiv, 19; Prov. xxiv, 29; Jer. l, 29.

[101]Aboth ii, 7; Sota i, 8; Num. Rab. xviii, 18; Sota 8a, 11a; Pes. 28a; Baba Kamma 92a.

[102]Sanh. 100a, bottom; Mishna Sota i, 7.

[103]Gen. ix, 6, which is not necessarily meant originally as a legal principle, but which is used by the Rabbis as such, Sanh. 57b. Cf. Matt. xxvi, 52; Sanh. 72b.

[104]Mechilta de R. Simon, p. 126, with reference to Exod. xxi, 14.

[105]Sanh. 52a with reference to Deut. xvii, 9; Maimonides Hilch. Sanh. xiv, 11.

death penalty be carried out.[106] According to the opinion of R. Akiba,[107] a capital sentence on "a defiant elder" could not be consummated outside of Jerusalem, nor even in Jabneh by the great Sanhedrin, while the Temple still stood; but he should be brought to Jerusalem and put to death on one of the middle days of the next festival when the city and the Temple were thronged with worshippers. Those condemned to death were given the opportunity to confess their sins when within ten cubits of the place of execution, the confession opening for them the gates of the future world.[108] It is related of one condemned man that when bidden confess he prayed "May my death be an atonement for all my sins"...[109] If the condemned man was unable to confess fully, he was bidden say "May my death be an atonement for all my sins."[110]

These four considerations, (a) the plain command of the written word of the Torah, (b) the recognition of the deterrent and preventive value of capital punishment, (c) the claims of just retribution and (d) the recognition of the expiatory character of the death penalty, leave it beyond doubt that the Rabbis approved of the theory of capital punishment. They accepted without question the teachings of the Torah, implying the justifiability of imposing the death penalty. At the same time, numberless passages testify to the sacred-

[106]The Jewish courts outside of Palestine were considered as having jurisdiction in capital cases only so long as the great Sanhedrin continued to hold its sessions in the special hall of the Temple. Mishna Macc. i, 10.

[107]Mishna Sanh. xi, 4 in connection with Deut. xvii, 13.

[108]Mishna Sanh. vi, 2; Sifre Zutta to Num. v, 6.

[109]Tos. Sanh. ix, 5.

[110]Mishna Sanh. vi, 2.

ness in which they held human life,[111] and many passages prove that they had a vivid sense of the irrevocability of a consummated death sentence. To put a man to death wrongfully is as though one destroyed the whole world.[112]

Rabbinical Modifications

But it is no less clear that the Rabbis did not favor capital punishment in practise. It is true, as will be shown later, that after the fall of the Temple in 70 C. E., they no longer had the right of imposing the death penalty. But we possess their theory of what their practise would have been had they had the opportunity of exercising it, and this theory tends altogether in the direction of modifying capital punishment to its virtual abolition.

The problem with which the Rabbis grappled was how could the death penalty which was demanded by the Law be mitigated in the face of the explicit words of the Torah. Commutation of the death sentence by a fine or by wergild could not be considered where the Bible did not specify the option of a ransom (*Kofer*). The Torah expressly prohibits modifying into a fine the death penalty which was the due of the murderer.[113] The Bible furnishes no precedent for commuting the death penalty to one of deportation. Exile involved the banishment of the Jew from the full exercise of

[111]Their use of the phrase "worthy of death" applied to such mild offenders as the scholar with stained clothing (Sabb. 104a), is naturally to be understood as an emphatic hyperbole.
[112]E. g. Mishna Sanh. iv, 5; Tos. Sanh. ix, 5; Macc. 5b.
[113]Num. xxxv, 31, 32; Exod. xxi, 30, 32.

Judaism. Herod was condemned for selling law-breakers out of the kingdom. "For slavery to foreigners and such as did not live after the manner of the Jews, and necessity to do whatever such men should command, was an offence against our religion rather than a punishment to such as were found to have offended, such a punishment being avoided in our original laws,"—the Bible.[114] The cities of refuge no longer had asylum power. Exile was considered a more grievous punishment than death by the sword or by starvation and was regarded as harder even than death, itself the hardest of the ten hardest things created in the world.[115] Enslavement to Jews was specified by the Bible as a legitimate punishment only in certain cases.[116] Similarly, both the application and the severity of scourging were limited.[117]

Prisons in Jewish antiquity were used usually as a ward house in which the accused was detained until sentence could be pronounced.[118] But sometimes the prison seems to have been used also as a punitive institution.[119] In one instance, the principle of commuting a death penalty to a sentence of life imprison-

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[114]Josephus *Antiq.*, XVI, i, 1. Compare I Sam. xxvi, 19.

[115]Baba Bathra 8b, 10a.

[116]Exod. xxii, 2; II Kings iv, 1; Josephus *Antiq.*, XVI, i, 1.

[117]Lev. xix, 20; Deut. xxii, 18; xxv, 3; II Cor. xi, 24; Luke xxiii, 15, 16, 22; Josephus *Antiq.*, IV, viii, 21; XIII, x, 6; Macc. iii, 1 seqq., 15. But see Maimonides Sanh. 19, where among the two hundred and seven cases for which flagellation is the legal punishment, eighteen cases are enumerated in which flagellation is imposed on the one deserving death "from the hands of Heaven."

[118]Lev. xxiv, 12; Num. xv, 34; Acts iv, 3; xii, 4; xxii, 19; Mechilta Mishpatim VI, p. 83a; Schechter, *Sectaries*, p. 12, ll. 2-6; Sulzberger, *Jew. Quart. Rev.*, 1914-15, V, 598-604.

[119]Ezra vii, 26.

ment is recognised. The Mishna prescribes[120] that when a man has twice committed a crime for which excision is the penalty and he has received the lash twice, on his committing this crime a third time, he is imprisoned and fed on barley until he bursts. Or when one has committed a murder and there are no witnesses to condemn him, he is imprisoned and fed on frugal fare of bread and water.[121] In other words, when a murder has been committed and it is certain that the accused man was the murderer, but owing to legal technicalities,[122] it is impossible legally to prove his guilt; or if the circumstantial evidence is thoroughly convincing,[123] the Rabbis felt that it would be dangerous to society and against all principles of justice to allow such a known murderer to go free. In any of these cases, he should be imprisoned in a den of the height or length of a man and fed in such a manner as to bring about his early death. This seems to be the only passage in Rabbinical literature in which imprisonment is spoken of as a possible mitigation of the immediate death penalty.

From one passage[124] it would seem that in later Rabbinic times, (c. 350 C. E.), when the penalty of death for murder could no longer be imposed by the Jewish court, it was recommended that the death sentence be commuted into one of blinding the mur-

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[120]Sanh. ix, 5.
[121]Cf. I Kings xxii, 27.
[122]Either the witnesses were separated and not together, (Rab), or the witnesses had not warned the murderer, (Samuel), or they had tripped up in giving evidence, (Abimi).
[123]J. Sanh. ix, 5.
[124]Sanh. 27a bottom.

derer. When it was reported that Bar Chama had committed a murder, the Exilarch bade Rab Abba (or Acha) bar Jacob investigate the case. If it proved that Bar Chama was guilty, his eyes should be put out.[125] But this passage stands alone, and does not allow us to draw any conclusion as to a general practise. Moreover the expression "to put out his eyes" may possibly be figurative, meaning imposing a fine or taking away authority.[126]

We see, therefore, that the necessity of adhering to the express commands of the Torah prohibited the Rabbis from commuting a death sentence into scourging, imprisonment, blinding or any other kind of mutilation, exile, enslavement, a fine or any other punishment. The exact words of the Torah had to be upheld.

Therefore, while rigidly maintaining the Biblical principle of capital punishment, the Rabbis availed themselves of their right to modify the *method* of executing the death sentence. If they upheld the death penalty, there was nothing to prevent their mitigating the severity of its application in every way possible. We have already seen how stoning was modified in practise to precipitation, and burning modified to strangulation followed by a nominal burning. Our consideration showed that these changes in method

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[125]The blind is one of the four classes (poor, leper, blind, childless), who are considered as dead. Nedarim 62b. Practically, the one blinded is rendered harmless for the future.

[126]Rashi ad loc. Kohut's *Aruch* כוה. See also Peah viii, 9 of the unjust judge, "until his eyes grow dim," with reference to Exod. xxiii, 8, Deut. xvi, 19.

apparently came about in order to secure the easiest and most humane methods of death, (since according to the golden rule even the condemned criminal is one's brother), and in order to spare the body, so far as possible, all mutilation or disfigurement. The general principle governing the lightening of the methods of death was that wherever the Torah does not specify which method of death is to be employed, the easiest and most humane method is to be used.[127]

Legal Restrictions

But the most thoroughgoing modification of the system of capital punishment was not brought about through change in the methods of imposing the death penalty, but through surrounding the accused with so many legal safeguards that it became virtually impossible ever to impose a death sentence.

The law limited the right of trying capital cases to the high tribunal of twenty-three, not even the king having the right to put to death other than through the Sanhedrin.[128] According to Rabbinical tradition, one very large class of capital cases was taken out of the jurisdiction of any human court, namely those in which the Bible stipulates *Kareth* or Excision as the punishment. This ruling at one stroke absolved the Rabbinical courts from the obligation of imposing the death sentence in a large number of cases.

In many passages in the Pentateuch it is stated that the one committing certain transgressions "will be cut

[127]Sifra 92a, 11; J. Sanh. VII, 24b; Sanh. 52b, bottom.
[128]Josephus, *Antiq.*, XIV, ix, 3; Mishna Sanh. ii, 2.

off from his kinsfolk."[129] Modern Biblical scholars understand the phrase as referring to the imposition of the death penalty by the court. The Karaites also understood *Kareth* in this sense, through a comparison of Exod. xxxi, 14b with the parallel passages xxxi, 14a, 15 and Num. xv, 35. The one passage prescribes *Kareth,* the others prescribe death as the punishment for Sabbath profanation. Similarly *Kareth* in Lev. xx, 3 is the equivalent of stoning, the punishment designated in the preceding verse for Moloch worship; and *Kareth* for blasphemy in Num. xv, 30 is the equivalent of stoning mentioned as the punishment for the same crime in Lev. xxiv, 14. The fate of Achan,[130] of Naboth,[131] and of the adulteress,[132] would seem to show that the whole family of the convicted person could judicially be put to death. In some cases,[133] the death penalty is specified as well as the penalty of *Kareth.*

None the less, the Rabbis consistently understand *Kareth* to be not a death penalty inflicted by man but a punishment left in the hands of Heaven. Thus the Rabbis interpret *Kareth* specifically as dying childless,[134] or as dying at 50 years, or, according to Raba, between 50 and 60 years, before completing the otherwise destined span,[135] or as the cutting off of the soul

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[129]Usually translated "cut off from his people." But the Hebrew term *amav* is plural and seems to mean 'kinsfolk' rather than 'people.' Gen. xvii, 14; Exod. xii, 15, 19; xxx, 33, 38; Lev. vii, 20f, 25, 27; xvii, 4, 9, 10, 14; xx, 6; xxii, 3; Num. xix, 13, 20, etc., etc.

[130]Josh. vii, 24f.

[131]I Kings xxi, 3; II Kings ix, 26.

[132]Ezek. xxiii, 47; Cf. also II Kings xxv, 7; Num. xvi, 32.

[133]E. g. Exod. xxxi, 14; Lev. xviii, 7, 8, 15, 20, 23, 29.

in the future life.[136] For this interpretation of *Kareth* as a punishment by Heaven would speak the personal pronoun in the phrase, *"I* will cut off," the active form sometimes used.[137] For this would also speak the passages wherein the death penalty is threatened as well as *Kareth,* usually adduced as favoring the other interpretation of *Kareth,* if we understand them, as we well may, as threatening an alternative, *either* the death penalty by the court *or Kareth* by God. That this may be the meaning is clear from a careful reading of Lev. x, 1-5, wherein the Moloch worshipper is threatened with death by stoning at the hands of the people, or if the people do not so punish him, then God will cut him off. Such phrases as "they shall bear their sin,"[138] or "they shall bear their sin and shall die childless,"[139] or "they shall die childless,"[140] would also be most naturally understood as taking the right of punishment away from the human court and leaving it to Heaven. It has been suggested that the Niqtal form, usually translated as passive "and shall be cut off," should be understood in a reflexive sense, "(that soul) cuts itself off." But this explanation

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[134]Yeb. 55a.

[135]Moed Katan 28a; J. Bikk. II, 1, 64c.

[136]Sanh. 64b, 90b to Num. xv, 31; Maimonides, Hilchoth Teshuba 8. According to Maimonides, "death by the hands of Heaven" differs from *Kareth,* in that the former refers only to this life, the death serving as an expiation, whereas *Kareth* refers also to the future life. But see Jebam. 2a, Tosafoth אשת on the meaning of *Kareth.*

[137]Lev. xvii, 10; xx, 3, 5, 6. Cf. "and *I* will destroy," parallel to "and shall be cut off" Lev. xxiii, 29, 30.

[138]Lev. xx, 19.

[139]Lev. xx, 20.

[140]Lev. xx, 21.

seems unlikely in face of the occurrence of the active forms "I will cut off" or "and I will destroy that soul from the midst of its people."[137] Whatever be the preferable explanation of *Kareth* in each passage in which the term occurs, the interpretation consistently given to it by the Rabbis is highly significant. Their tendency away from capital punishment is clearly seen in their leaving to the heavenly tribunal the punishment in all cases where *Kareth* is prescribed in the Bible.[141]

The other restrictions in court procedure are too well known to need setting forth here in detail. It is enough to mention some of the rules of evidence, particularly the minute safeguards with which the giving of testimony was surrounded. Torturing of witnesses to extract from them convicting evidence was entirely unknown. The aim of the court was to lead the witnesses into giving evidence favorable to the accused, not to coerce them into helping condemn him. According to R. Jose b. Jehudah, a witness could testify only in favor of the accused.[142] The two witnesses had to be free adult men,[143] sound in mind and body, of unquestioned integrity,[144] and free of all suspicion of personal relationship to the defendant[145] or interest in the case.[146] They were first solemnly warned and adjured as to the blood responsibility

[141]*Kareth,* according to Rabbinical law, could be commuted to scourging under certain conditions. Mishna Macc. iii, 15.
[142]Sanh. 33b. bottom.
[143]Baba Kamma 88a.
[144]Mishna Sanh. iii, 3; Sanh. 24a, 24b, 25b.
[145]Mishna Macc. i, 8; Macc. 6b, 7a; Mishna Sanh. iii, 4.
[146]Baba Bathra 43a.

resting on them and their heirs after them.[147] They were then cross-examined separately,[148] very searchingly,[149] with the *haqira* affecting place,[150] time, the warning, etc., and with the *bediqa* going into the smaller details.[151] A slight contradiction or discrepancy in their evidence invalidated their testimony.[152] They had to prove the act, and, what was far more difficult, prove also the intention. In order to be able to prove deliberate and understanding premeditation, the witnesses must both have warned the accused before he committed the crime,[153] with a clear warning (*Hathraa*), including a definite reference to the kind of punishment and the measure of punishment which his act would involve.[154] The warning given by them had to have been so clearly understood, that the accused had replied that he would commit the crime none the less, thereby showing that he had fully understood the warning.[155] The act must have followed closely on their warning, or the warning by the witnesses was not considered adequate, on the ground that in the intervening time it may have escaped the culprit's memory.[156] If there was a technical flaw in

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[147]Mishna Sanh. iv, 5; Sanh. 37a.
[148]Sanh. 29a; Susanna 52 seqq.
[149]Sanh. 32b.
[150]Mishna Sanh. v, 1.
[151]Mishna Sanh. iii, 6; v, 2.
[152]Mishna Sanh. v, 2; Sanh. 40a; Susanna ibid.; Mark xiv, 56, 59.
[153]Mishna Sanh. *passim;* Sanh. 40a-41a; 80a; Mishna Macc. 1, 9; Macc. 6b; Mechilta to Exod. xxi, 12; Sifra to Num. xv, 33 and to Deut. xxii, 24.
[154]Sanh. 8b; Macc. 16a.
[155]Sanh. 8b.
[156]Sanh. 40b.

the giving of this warning by the witnesses, the accused was given the benefit of the doubt that there had not been *dolus* but only *culpa,*[157] and where the crime was not premeditated, no death penalty could be imposed.[158]

Further, circumstantial or presumptive evidence was disallowed. The witnesses had to have seen each other when the act was committed,[159] and had to have seen the act itself, and not only what went before it or what followed it. For instance, even in early Rabbinic days, Simon ben Shetach (fl. 80 B. C. E.), who undoubtedly believed in and imposed the death sentence during his lifetime,[160] did not consider the strongest circumstantial evidence as evidence. It is related[161] that he once saw one man pursuing another. He followed them and found the pursued man murdered and the pursuer holding a sword dripping with blood. Simon said to the murderer: 'Either you or I killed this man. But what can I do? Your blood guilt is not delivered into my hands; for the Torah says[162] that you can be condemned only by the actual testimony of two or more witnesses. May God who knows the inward thoughts requite the one who committed this murder.'[163]

In these and in similar ways, tradition developed the

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[157]Sanh. 41a; 8b; Macc. 6b; 9b.

[158]E. g. a money penalty was allowed in compensation for unintentional murder or constructive homicide, Exod. xxi, 29, 30.

[159]Macc. 6b.

[160]E. g. Mishna Sanh. vi, 4.

[161]Sanh. 37b; Mechilta to Exod. xxiii, 7.

[162]Deut. xvii, 6.

[163]Sanh. 37b and Tosafoth; Maimonides, Hilchoth Sanh. xx, 1.

rules contained in the Torah, that two witnesses were needed and that the witnesses themselves had to carry out the death sentence. As the number of necessary conditions increased, it became virtually impossible in a capital case to obtain unassailable testimony adequate for a condemnation.

Many other legal refinements made it still more certain that no one would ever be legally condemned to death. For example, murder was not punishable by death, as we have seen, if it could be proved to have been not fully premeditated or intentional. Thus, if the murderer had meant to kill one man and had killed another; or had he meant to wound him on the thigh and instead had struck him on the heart and killed him, capital punishment could not be meted out, since the criminal intent to kill was not present.[164] Again, if the murderer were weak-minded, or intoxicated, or a deaf-mute, or a minor, or acting under compulsion or acting in self defence,[165] etc., he could not be condemned to death. Or again, if the man murdered had been fatally ill or for any other reason would not have lived had he not been murdered, the guilty man was not considered liable to the death penalty. And even if the murderer was suffering from an illness that in the ordinary course would shortly kill him, the court would not anticipate God's decree by carrying out the death penalty.

But over and above these thick protecting hedges which made it virtually imposible to obtain a death sentence, there were many other considerations which

[164]Mishna Sanh. ix, 2.
[165]Sanh. 72a.

further removed the possibility of executing a capital sentence. Thus there was a thorough-going rule that no punishment affecting the personality of a man[166] might be imposed on a deduction a fortiori.[167] Unless there was explicit Biblical warrant for the death penalty, it was prohibited to deduce this penalty by rules of interpretation, a principle in itself that worked consistently towards moderating the severities of the written law.

Moreover, just as the power of the witnesses was minimized and the rights and privileges of the defendant were magnified, so also the rights and privileges of the judges were hemmed in and restrained in every way. Only a high court of twenty-three could try capital cases.[168] The judges all had to be picked men of high standing, character and attainments.[169] They were impressed with the words of their own warning to the witnesses, that he who causes a soul to be put to death unjustly is as though he had destroyed the whole world.[170] When engaged on a capital trial, they were put under severe discipline.[171] They took the place both of the counsel for the defendant and of the jury.[172] Two death penalties could not be pronounced on one day.[173] For final condemna-

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[166]Except in pecuniary penalties, Baba Kamma 4b, Tosafoth.

[167]Macc. 5b; Kerit. 3a top; Sanh. 54a bottom; 76a; Sifra to Lev. xx, 17.

[168]Mishna Sanh. i, 4.

[169]Mishna Sanh. iv, 2; Sanh. 36b.

[170]Mishna Sanh. iv, 5.

[171]Tos. Sanh. ix, 1.

[172]Tos. Sanh. vii, 2. The duty of trying to find means of freeing the accused is deduced from Num. xxxv, 25.

tion, a second ballot had to be taken on the following day.[174] If twelve of the twenty-three judges were in favor of acquittal against the other eleven, the defendant was freed by the majority of one. But if twelve held him guilty and eleven held him innocent, the defendant could not be condemned by the majority of one. A majority of at least two was necessary for a condemnation.[175] A judge was not permitted to change his mind and declare his decision for a condemnation when once he had voted for an acquittal.[176] Unless each judge could give an individual reason for his opinion his vote was not counted.[177] According to the striking opinion of Rab Kahana, if the judges were unanimously in favor of *conviction,* the accused should be freed.[178] In general, it was held to be better that the guilty should escape punishment than that one innocent man be put to death. The judges had the less hesitancy in inclining to mercy, because of the belief that God would not allow the guilty to remain unrequited.[179] In the story of circumstantial evidence quoted above, Simon ben Shetach left the punishment of the murderer to God. When the Jewish courts no longer had jurisdiction, it was felt that God would fittingly punish those who had rendered themselves

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[173]Except for an adulterer and an adulteress receiving the same punishment for the same sin, J. Sanh. IV, 5. Tos. Sanh. vii, 2.

[174]Mishna Sanh. iv, 1; v, 5.

[175]Mishna Sanh. i, 6; iv, 1; v, 5.

[176]Mishna Sanh. iv, 1; v, 5.

[177]Tos. Sanh. vii, 2, ix, 1; Sanh. 32a, 34a.

[178]Sanh. 17a.

[179]Deut. xxxii, 35.

legally liable to the death penalty.[180] The Mechilta, elaborating the Biblical words "For I, God, will not let the guilty go free,"[181] says, that if one who is guilty has been discharged by the court as not guilty, he is not to be taken back for a retrial. God has instruments and means enough to bring upon him the punishment that he has incurred.

After an acquittal there could be no appeal; but after a conviction an appeal could be lodged at any time.[182] If one ultimately was condemned, he was given every facility to escape his fate through the publicity of a herald's proclamation,[183] through the assiduous attempt to elicit new favorable evidence even during the procession to the place of execution,[184] etc.

Examples of legal safeguards could readily be multiplied. But it is sufficient for our present purpose to sum up these details by saying that the publicity of the trial, the confrontation of the defendant and the plaintiff, the absence of torture, the careful elimination of improper witnesses, the solemn warning to the witnesses, the searching examination of the witnesses, the remarkable requirements for a valid warning, the

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[180]Instead of the required stoning, the culprit would fall from a roof or be trampled by an animal. Instead of being burned by the sentence of a court, he would fall into a fire or be bitten by a snake. Instead of being executed by the court, he would fall into the power of the government or of robbers. Instead of suffering the legal punishment of strangulation, he would die from drowning or suffocation. Sanh. 37b.

[181]Exod. xxiii, 7. Rashi.

[182]Mishna Sanh. iv, 1.

[183]Sanh. 42b, 43a.

[184]Macc. 7a; Mishna Sanh. vi, 1 seqq.; Susanna 45; Moed Katan 14b.

extraordinarily high standard as to what constituted evidence, the equally extraordinary number of loopholes allowed to the defendant, the limitations on the court, forbidding it to deduce a capital punishment if the Bible did not explicitly call for one, the immediate acquittal by any majority of the judges, the postponement of the final decision if a majority were in favor of death, the obligation on those who had voted against the death penalty of keeping their vote unchanged at the second ballot, together with the permission to change their opinion granted those who had voted in favor of the death penalty, the right of the judges after a condemnation to change their opinion any time before the execution, the constant public appeal for further evidence until the final execution, the prohibition of more than one capital sentence being pronounced in one day, and other innumerable elements of legal interpretation and procedure, all worked to make legal capital punishment impossible of practical application.

Practise and Theory

In view of the fact that in pre-Christian and the earliest Rabbinic times legal capital punishment was carried out, as has been shown above, it becomes necessary to inquire when and why the practise of capital punishment ceased among the Jewish people. In Biblical times, and in post-Biblical times when the Sadducees controlled Jewish life, the old death penalties were carried out without essential modification. But under Roman rule, a change took place. Schürer claims[185]

[185]Schuerer, (4th edit.), II, 261, note 79; and pp. 264, 265.

that from the very beginning of the Roman dominion the Jewish courts lost their competence to judge capital cases. According to the gospel according to John, Pilate is made to say to the Jews, "Take Jesus yourselves and judge him according to your law. The Jews said unto him, 'It is not lawful for us to put any man to death.' "[186] Talmudic sources state that forty years prior to the destruction of the Temple, i. e., 30 C. E., the right of deciding capital cases was taken from the Jewish courts.[187] But Rab Joseph, R. Hiyya and the school of Hezekiah taught, that this right was taken away from the Jews by the Roman government, from the time that the Temple was destroyed, i. e., 70 C. E.; adding, that the Sanhedrin abolished the practise though not the theory of the four death penalties.[188] Of these two dates given by the Rabbis, the second is apparently correct. The earlier date, 30 B. C. E., probably arose from a misunderstanding. The original statement made by R. Ishmael b. Jose, (end of the second century), was that forty years before the destruction of the Temple, the Sanhedrin moved from the Temple and held its sessions in a shop. There is no reason to doubt this statement, Schürer notwithstanding. But R. Isaac bar Abdimi added to it: "This implies that they no longer judged capital cases." This second statement is seemingly not an

[186]John xviii, 31. The trial of Paul described in Acts xviii, 12-16, reflecting conditions in Corinth, depicts the Jew as exercising jurisdiction only in religious matters.

[187]Sanh. 41a bottom; Sabb. 15a; Aboda Zara 8b; Rosh Hashana 31a bottom; Mechilta de R. Simon p. 126; J. Sanh. I, 1, 18a; VII, 2, 24b; Nachmanides to Numbers xxxv, 29.

[188]Sota 8b; Keth. 30a bottom; Sanh. 37b.

historical tradition, but only an inference drawn on the theory that capital sentence could be pronounced only in the special hall of the Sanhedrin in the Temple. This inference is disproved by a number of historical facts, which show that the Rabbinical courts had competence in capital cases in Roman times until the destruction of the Temple and of the Jewish State in 70 C. E. Josephus mentions the reluctance of the Pharisees to impose the death penalty, contrasting them in this regard with the Sadducees.[189] He states further that when a Sadducee became a judge, he would adopt Pharisaic norms of judgment, because the public would not otherwise tolerate him.[190] Elsewhere[191] he mentions that the Essenes punish blasphemy by death. These three notices, although not necessarily referring to post-Christian times, are significant when taken in connection with the following facts. Up to the time of the destruction of the Temple, the Romans granted to the Jews the right to put to death any foreigner, even a Roman citizen, who passed beyond the Temple limits,[192] and there is no warrant for Schürer's supposition that this right could be exercised only after obtaining the sanction of the procurator.[193] Certainly under King Agrippa, 41-44 C. E., this Jewish law of capital punishment was in force.[194] The story of the trial of Stephen[195] and the different accounts of the trials of Paul before the

[189] *Antiq.*, XIII, x, 6.
[190] *Ibid.*, XVIII, i, 4.
[191] *War*, II, viii, 9.
[192] *War*, VI, ii, 4.
[193] Schuerer, II, 262. See J. Juster, *Les Juifs dans l'Empire Romain*, II, 142, note 5.

Sanhedrin,[196] although they are often untrustworthy, presuppose the competence of the Sanhedrin to judge capital cases at a period later than the year 30 C. E. Anan, the Sadducean highpriest for three months in 62 C. E., is said by Josephus to have imposed and carried out the death penalty.[197] Rabbi Eleazar ben Zadok cannot have seen the burning of the high priest's daughter[198] prior to 40 C. E., since in the year 70 C. E. he was still a young man.

There seems therefore to be no valid reason for doubting the statement of R. Joseph, R. Hiyya and the school of Hezekiah, that the Roman government allowed the Jewish courts a measure of jurisdiction in capital cases up to the time of the destruction of the Temple in 70 C. E.,[199] but that after that date the Jewish courts were no longer allowed this jurisdiction. Origen (d. 254 C. E.) says that the Jewish law can no longer punish the murderer or stone the adulteress because the Roman government has assumed these rights.[200] The Didascalia[201] also remarks, that the Jewish law of capital punishment is no longer in force.

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[194]Agrippa's Letter to Caligula; Philo *Leg.*, 39, quoted in Juster *loc. cit.*, p. 139, note 1.

[195]Acts vi, 7 et seqq.

[196]Acts xxi, 28f; (xxiv, 6; xxi, 29); xxvi, 21; (xxiii, 6, 29; xxiv, 5, 12ff; xxv, 7f. 27; xxii, 24, 30); xxiv, 6 (8); xxiii, 3, 9.

[197]*Antiq.*, XX, ix, 1. Jos. Lehmann, *Révue d. Etudes juives*, XXXVII, 1898, pp. 13, 14.

[198]See note 33.

[199]Juster, *l. c.* 122-149, from a thorough examination of the sources comes to the conclusion that the Sanhedrin preserved the right of both pronouncing and of carrying out a capital sentence until the year 70 C. E.

[200]In Rom. 1, 6, c. 7, quoted by Juster, *ibid.*, p. 150.

[201]Didascalia Ch. xxvi, 6; xix, 2. Juster, *ibid.*

The Talmud testifies uniformly that the Jewish courts had no power over life and death after the year 70 C. E.

But there are some minor exceptions to this that must be noted.

(i) A certain R. Hama b. Tobiyah caused Imarta, daughter of the priest Tali, to be burnt. But his action was condemned, both because the sentence had been carried out in the barbarous non-Pharisaic method that R. Eleazar ben Zadok had seen in his youth,[202] and because a capital sentence had been imposed after the destruction of the Temple.[203] (ii) On one occasion a certain Tamar was condemned (although not to capital punishment) by Rab Ammi, Rab Assi and Rab Hiyya b. Abba in Tiberias (c. 300 C. E.). She complained to the Roman proconsul in Caesarea of this usurpation of the Roman right of judgment, and the influential intervention of Abbahu was required to protect the Rabbinical judges.[204] (iii) On another occasion, Rab Shila, perhaps the Tana of that name, caused a man who had committed an offence to be whipped. The man complained to the Roman government that Rab Shila was exercising judicial functions without the authority of the government. The government sent an officer to investigate the case, and the complainant was adjudged by the officer to have rendered himself liable to the death penalty through the offence for which R. Shila had punished him. The offender was

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[202]See note 33.

[203]Sanh. 52b.

[204]J. Meg. III, 2. 74a. Graetz (3rd edit.), IV, 284f. Bacher, *Agad. d. pal. Amoraer,* II, 94f. For a different interpretation, see Perles, *Monatsschrift,* XXXVII, 359-361.

thereupon handed over by the officer to Rab Shila. But Rab Shila refused to consummate the sentence, on the ground that since the exile from Palestine, the right of capital punishment had not been vested in the Jews. Subsequently, when the man was about to make a second complaint about Rab Shila, Rab Shila who had been given the staff of judicial authority, killed the man with his staff.[205] (iv) Another case in point is the following: A man once declared before Rab (d. 247 C. E.), that he would persist in a certain course despite Rab's warning. Rab Kahana who was present rose up and killed the contumacious man. Rab declared the killing to be legally justified, but advised R. Kahana to flee to Palestine, since the new Persian rulers were stricter in punishing bloodshed than the Romans had been.[206] (v) Lynch law is recognized by the Mishna, when it allows certain offenders to be struck down *flagrante delicto*.[207] (vi) In connection with the remark that the one born under the planet Mars will be a shedder of blood, Raba (4th century) said, 'I was born under Mars'; to which his pupil Abaye remarked, 'Master, you also (as exilarch) punish and put to death.'[208] (vii) Origen in his letter to Africanus (240 C. E.) declares that the Jewish

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[205]Ber. 58a.

[206]Baba Kamma 117a, 117b.

[207]Sanh. viii, 7. According to tradition, the offender may be killed *flagrante delicto* in the three cases there mentioned, only if he has received legal warning (see to notes 153-158), and if a lesser physical injury would be insufficient to prevent the crime. Mishna Sanh. ix, 6 mentions three other cases, in at least one of which the zeal of the one who would strike down the offender is restrained by a number of conditions.

[208]Sabb. 156a.

Patriarch in Palestine exercised the power of imposing and carrying out capital sentences.[209]

But the utmost that these cases prove is, that subsequent to 70 C. E., a capital sentence carried out by a Jew, whether by lynch law or after judicial trial, was an exception occasionally tolerated through the generosity, the weakness or the corruption of the Roman or the Persian authorities. The fact remains that subsequent to 70 C. E., the Jewish law governing capital punishment fell into disuse. The Amoraim, although they were the bearers of tradition, were not familiar in practise with the actual judgment of capital cases and the imposition of capital punishment. It is clear, therefore, that many of the dicta of the later Rabbis concerning details of the law of capital punishment are legal inferences rather than historical facts, and many of their discussions are discussions of theory as to how the death penalty would be carried out if the Rabbinic courts should again have jurisdiction.

Similarly, much of the elaboration of criminal legal procedure at which we have glanced is a theoretic development, dating from the first centuries of the common era, which was never put to a practical test. Many elements in it, such as the regulations governing witnesses and their testimony, are elaborated theoretical developments of early practise. In their fully developed form, these regulations would have broken down as unworkable at the first touch of practise. Much else is on the face of it dialectic, legal discussion

[209] Ep. ad. African. Par. 14. Juster *l. c.*, p. 151, note 2.

conducted on the principle of the meritorious nature of constant exposition and interpretation of the law. This principle indeed is quoted in connection with the decisions governing capital punishment.[210] As an instance of this type of expository discussion, may be mentioned the decision[211] that strangling should be the punishment for one who through craft or force gets another into his power, forces him to serve, and then sells him into slavery. Such a ruling is hardly a precedent based on practical experience. The discussion in the Talmud[212] proves it to be only a theoretic case. Similarly, the restrictions governing the treatment of the apostate city are admittedly only theoretic, since the conditions required were so many and so specialized that they could never occur together. It is frankly confessed, that these conditions are only the result of study-house discussion conducted for the merit of detailed and far-reaching interpretation.[213] In exactly the same way, it is openly stated, that a case of the "rebellious, gluttonous son"[214] never had occurred and never would occur, the conditions required by the Rabbinic jurists being practically impossible of occurrence together. The formulation of these conditions was admittedly only the result of dialectic development.[215]

A passage was quoted above,[216] prescribing imprison-

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[210]Sanh. 51b.
[211]Mishna Sanh. xi, 1.
[212]Sanh. 86a.
[213]Tos. Sanh. xiv, 1; Sanh. 71a.
[214]See note 98.
[215]Deut. xxi, 18-21; Mishna Sanh. viii, 1-5; Tos. Sanh. xi, 6; Sanh. 71a.
[216]Note 120.

ment in a *kipah* in certain cases. Where the Talmud asks what is meant by *kipah,* and R. Jehudah explains that by *kipah* is meant a den of about five and a half feet in size,[217] it is clear that we are dealing with traditions about legal matters which had not had practical application within the memory of the Amoraim. When, further, we remember the discussions among the Rabbis themselves, such as which death penalty should go with which crime, or which would be the correct method of execution, or whether the dead body has to be hanged only in certain cases or in others also, and similar debates, it is clear that we often have to do with matters of theoretic discussion about which there was no certain tradition. In fact, in one passage, a legal decision concerning capital punishment is called a decision that will be of practical application only when the Messiah comes and the Jewish system of capital punishment will be once more in use.[218]

The result, therefore, to which our investigation leads along various converging lines is, that originally the death penalty was carried out through the decisions of the court approximately according to the demands of the Bible. But at least as early as the beginning of the Christian era, modifications had arisen, particularly among the Pharisees, affecting the methods of inflicting the death penalty.[219] These modifications apparently grew out of two chief causes, (a) the

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[217]Sanh. 81b.
[218]Sanh. 51b.
[219]E. g. Judah ben Tabbai and Simon ben Shetach, Mishna Macc. i, 6; Macc. 5b; Sanh. 37b.

desire to preserve the body from mutilation or disfigurement (possibly in part owing to the Pharisaic belief in the resurrection which had not been of weight with the Sadducees), and (b) the tendency to extend the golden rule, so as to make the death penalty as humane as possible. But the Rabbinic courts lost their jurisdiction in capital cases at the fall of the Jewish state in 70 C. E. With this, went the transference of the problem of capital punishment from the realm of fact to that of legal theory, and Rabbinic, juristic imagination became free to develop the field of historical tradition, untrammeled by the restraints of practise. The compensating spiritual inbreeding, which occurred when external manifestations of Jewish national life were proscribed, resulted, in this special legal field as in all other fields of Jewish thought, in the over luxuriant development of the theory of Jewish practise. In Amoraic times, the Rabbis no longer recognised with certainty in many cases, whether a practise was old and traditional, or whether it was a comparatively new development based only on theoretic deduction. Even in early Tannaitic times, there was often uncertainty as to what was known through tradition and what was known through interpretation. This is brought out very clearly in the account of the discussion between Hillel and the Bene Bethera on the question of the sacrifice of the paschal lamb on Sabbath.[220] The Rabbis therefore often projected legal conceptions into the past as actual facts.[221]

[220]J. Pes. VI, 1 beginning, 33a.

[221]Sanh. 53a, top, makes the claim that the decisions con-

It is impossible for us to pick out from the vast accumulation of statements, rules and principles governing capital punishment according to Amoraic ideas, exactly how much is historical tradition founded on actual practise and how much only theoretic deduction. But from the beginning of the Rabbinic period, we can clearly trace a growing feeling of repugnance to capital punishment, which, along various lines, succeeded in making capital punishment obsolete through legal theory. Had the later Rabbis ever been granted the right of trying capital cases, the theory which had been developed would have made legal capital punishment impossible of application. Thus the Mishna already could say,[222] that a Sanhedrin condemning to death once in seven years was called a destroying or bloody Sanhedrin. Rabbi Eleazar ben Azariah (first cent.) said that it was so called for imposing the death penalty even once in seventy years.[223]

It should be plainly recognised that capital punishment was never formally abolished by the Rabbis. The penalty of death was demanded by the laws contained in the sacred statute book, the Bible, and as such it was accepted as needing no justification or defence. But it was legislated out of all practical application in the development of the law. The Rabbis of the Talmudic era abolished capital punishment in

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cerning the four methods of capital punishment are traditional.

[222]Mishna Macc. i, 10.

[223]It is not unlikely that both statements represent historical theory rather than historical fact, a suggestion that seems to find support from the words that follow, in which Rabbi Akiba and Rabbi Tarfon claim that had they been members of

the only way open to them,—in theory, as they would undoubtedly have abolished it also in legal practise while retaining it as a dead letter on the fundamental statute book, the Bible, had Jewish national independence been regained in their day.

Post-Talmudic Development

A few words should be added relative to the development of the idea of capital punishment among the medieval Jews.

In post-Talmudic times, the problem of capital punishment according to Jewish law scarcely arose. Although the theory of it had been fully worked out, there were no occasions for the application of the theory, both because the Temple no longer stood and the Jewish courts had no jurisdiction,[224] and because after the interruption of *Semicha* (ordination), no judges were regarded as competent.[225] This statement is true, however, only with certain limitations. Although as a general rule the Jewish courts in the diaspora had no jurisdiction in capital cases, there were times and places in which the power of imposing the death penalty was vested in the Jewish courts. Thus Asheri (c. 1300) wrote: "In no country of which I have heard have Jews their own courts for the trial of criminal cases except here in Spain. It was a source of great astonishment to me when I came to Spain, that the Spanish Jews should try criminal cases

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a Sanhedrin, the death sentence would never have been imposed.

[224]See notes 104 and 105.

[225]Tur, Hoshen Mishpat, I. 3.

without the full and authorized Sanhedrin; but I was informed that this was done in accordance with an order of the government."[226] Similarly, we find the Jews of Tudela asking the viceroy of Navarre, "That he would be pleased to order and that we practise the Jewish law as our ancestors have hitherto; that is, when a Jew or Jewess commits a sin, on our magistrates applying to the bailiff and notifying to him the sin committed, and the punishment it deserved according to Jewish law, the bailiff shall execute it, and enforce the sentence of our said magistrates, whether of condemnation or acquittal; or of any demand from one Jew to another, as we have been accustomed, not affecting the rights of our lord the king." This right was granted them.[227]

Asheri himself unhesitatingly imposed the sentence of death on an informer.[228] The *Moser* (informer, *delator*), constituted so poignant a danger to Jewry in exile, that the death penalty was not infrequently consummated in his case. Jewish law gives the right to kill the informer, on the principle of life for life. Since he is seeking your life, you are justified in saving your own by taking his.[229] The death sentence on the *Moser* was pronounced by the Jewish community and carried out by the non-Jewish authorities to whom the convicted *delator* was handed over. Maimonides (12th cent.) declares that it regularly happens in the cities of the West that they kill informers, or hand

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[226]Responsa XVII, 8. Cf. Teshuboth Ha-Rashba, II, 290.
[227]Lindo, *The Jews of Spain*, p. 150f.
[228]Responsa XVI. 1.
[229]Ber. 62b, 72a.

them over to the non-Jews to be killed or dealt with according to their guilt.[230]

Similarly, Asheri's son, Jacob, in conjunction with a tribunal of Rabbis in Toledo, condemned to death the informer Joseph ben Samuel and handed him over to the royal executioner.[231] Joseph ibn Migas of Lucena (d. 1141) caused an informer to be stoned on the eve of the day of Atonement.[232] Others, who approved of the extermination of informers, or who actually passed the sentence of death on them and handed them over to the State authorities for execution, were such leaders of Spanish and North African Jewry as Jonah Gerondi and Solomon ben Adereth (c. 1280),[233] Isaac ben Shesheth (14th cent.), Abraham Benveniste (1432), Simon ben Zemach Duran (1400), and his son Solomon. In the particular case in which Jonah Gerondi and Solomon ben Adereth acted as the judges (c. 1280), the family of the informer tried in vain to stir up the non-Jewish authorities by declaring that a judicial murder had been committed. They claimed that according to Jewish law, the Jews had long foregone the right of imposing a capital sentence, that the sentence had not been pronounced by a Sanhedrin of twenty-three, etc. The authorities refused them a hearing. But Solomon ben Adereth found it necessary to justify the action that had been taken. He therefore submitted the case in all its details to the

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[230]Yad, Hilchoth Hobel u-Mazzik, viii, 2.

[231]Judah ben Asher, Responsa Zichron Jehuda f. 55b, No. 75, quoted by David Kaufman, *Jew. Quart. Rev.* 1896, VIII, pp. 219f.

[232]Ibid.

[233]Responsa of Rashba V, 290.

Rabbis of North France. Only one answer has been preserved,—that of Rabbi Meir of Rothenburg, who clearly and decidedly ranks himself on the side of Ben Adereth.[234] But it will be seen that in all these cases, the utmost power that was allowed to the Jewish tribunal was that of pronouncing the sentence of death. The consummation of the sentence was left to the State authorities. On Aug. 21, 1379, at the request of a delegation of Jews, the royal farmer of taxes, Joseph Pichon, was beheaded as an informer by the royal executioner. One result of this affair was, that the Cortes issued the following decree, depriving the Rabbis and the Jewish courts of the country of the right of deciding criminal cases: "We ordain and command, that henceforward it shall not be permitted for any Jews of our kingdoms, whether rabbis, elders, chiefs or any other persons that now are or shall be hereafter, to interfere to judge in any criminal cause to which death, loss of limb or banishment is attached; but they may decide all civil causes that appertain to them according to their religion. Criminal cases shall be tried by one of the Alcaldes, chosen by the Jews in the towns and places of their respective jurisdictions.... This is to be understood for those criminal cases that have hitherto been tried by the said Jews....[235] Subsequently, owing to the influence of Abraham Benveniste, this right of judging criminal cases was restored to the Jewish courts in Spain.

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[234]Kaufmann, *Ibid,* pp. 221-238 gives all the details of this interesting leading case.

[235]Lindo, *Jews of Spain,* 160-162. Graetz, *Geschichte,* VIII, 44.

But this power could hardly be exercised outside of Spain and North Africa, and in those lands it could be exercised only in favorable periods. In Angevin England, "Criminal cases between Jews, except for the greater felonies, as homicide, mayhem, etc., could be decided in the Jewish courts according to Jewish law."[236] In other lands also, the Jewish courts were sometimes empowered to try lesser criminal cases; but rarely, if ever, could they independently impose and carry out the death sentence. At a later period, the Kahals in Eastern Europe were granted autonomous jurisdiction in civil cases. But their greatest power hardly exceeded the right given them in Lithuania by charter of King Michael Wishnevetzki (1669-73), "to summon the criminals before the Jewish courts for punishment and exclusion from the community when necessary." Rabbi Meir Sack emphatically protested against buying the freedom of Jewish criminals from the authorities. "We should endeavor to deprive criminals of opportunities to escape justice." Similarly, Meir Lublin declares that the death penalty for a murderer, decreed by the law of the land, should be allowed to be consummated, if the murderer were a Jew.[237]

It may be stated broadly, that after the Roman period, the right of pronouncing the death sentence was only rarely granted to the Jews, while the right of inflicting capital punishment was practically never vested in the Jewish community. Theoretically,

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[236] Jacobs, *Jews of Angevin England,* pp. 331, 43, 49.
[237] Responsa, 138, *Jew. Encycl.,* Art. Lithuania.

Jewish legal opinion gave to the leading authorities of the generation or of the district, the right to act as a competent Sanhedrin of twenty-three in judging criminal and capital cases, on urgent occasions of popular wrongdoing.[238] But this right could so rarely be exercised that it became virtually obsolete.

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[238]Tur and Shulchan Aruch, Hoshen Mishpat ii. Cf. the exemplary punishments referred to above, notes 14 and 80.

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